COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

135 WELLS AVENUE, LLC, *Plaintiff-Appellant,* v. HOUSING APPEALS COMMITTEE, et al., *Defendants-Appellees.*	Appeals Court No. 2016-P-1570

135 WELLS AVENUE, LLC'S
PETITION FOR DIRECT APPELLATE REVIEW

Michael D. Vhay (BBO #566444)
Valerie A. Moore (BBO #684849)
FERRITER, SCOBBO & RODOPHELE, PC
125 High Street, 26th Floor
Boston, MA 02110
(617) 737-1800
mvhay@ferriterscobbo.com
vmoore@ferriterscobbo.com

December 12, 2016

I. Request for Direct Appellate Review

135 Wells Avenue, LLC ("135 Wells") hereby requests direct appellate review by this Court of the Land Court's August 16, 2016 judgment, memorandum and order (the "Decision"), denying 135 Wells's motion for judgment on the pleadings and granting cross-motions for judgment on the pleadings by the Housing Appeals Committee of the Department of Housing and Community Development ("HAC"), the City of Newton (the "City") and the Newton Zoning Board of Appeals (the "ZBA").

A copy of the Decision is attached hereto as Exhibit A. Direct appellate review is warranted to resolve two novel questions of law, the Decision's answers to which have given municipalities a means of thwarting the Legislature's goals in adopting G.L. chapter 40B, the Commonwealth's most successful initiative for constructing affordable housing.

II. Prior Proceedings

In May 2014, 135 Wells applied to the ZBA for a comprehensive permit under G.L. c. 40B, §§ 20-23, for a 334-unit rental project at 135 Wells Avenue in Newton (the "Project"). The Project proposed to make

25% of its units "low or moderate income housing" within the meaning of c. 40B, § 20.

Chapter 40B, § 21, allows a local zoning board of appeals to grant any local "permit or approval" needed to build affordable housing. In its application, 135 Wells asked the ZBA to approve an amendment to a restrictive covenant held by the City that limits all properties along Wells Avenue to various non-residential uses (the "Covenant").

Prior to May 2014, the City's Board of Aldermen had approved Covenant amendments eighteen times[1] for various prohibited, non-residential developments along Wells Avenue. In the normal course, chapter 40B would prevent a municipality from approving a non-residential development, but withholding similar approvals for affordable-housing projects. Nevertheless, in December 2014, the ZBA claimed it lacked the authority under chapter 40B to approve a Covenant amendment, and thereafter denied 135 Wells's c. 40B application.

In December 2014, 135 Wells appealed the ZBA's decision to HAC pursuant to c. 40B, § 22. In December

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[1] The Aldermen approved a nineteenth amendment while 135 Wells's application was pending.

2015, HAC determined that the ZBA (and by extension, HAC) did not have the power under c. 40B, § 21, to approve amendments to the Covenant as any other local "permit or approval" under c. 40B.

In January 2016, 135 Wells petitioned the Land Court for review of HAC's decision, pursuant M. G.L. c.30A, § 14. The parties (135 Wells, the ZBA, HAC and the City) submitted cross-motions for judgment on the pleadings. On August 16, 2016, in the Decision, the Land Court held that an amendment to the Covenant was not a "permit or approval" under c. 40B, §§ 21 and 23, and thus neither the ZBA nor HAC had the power to grant 135 Wells's requested amendment.

In September 2016, 135 Wells filed a notice of appeal of the Decision. The Appeals Court docketed 135 Wells's appeal on November 21, 2016.

III. Facts Relevant to the Appeal

This appeal turns on whether the City's repeated amendments to the Covenant are "permits and approvals" that may be granted by a zoning board of appeals or HAC under c. 40B, §§ 21 and 23. The answer lies in the origin of the Covenant, how the City has used amendments to the Covenant to regulate development

along Wells Avenue, and how those amendments compare with other "permits and approvals" that zoning boards and HAC may grant under Chapter 40B to facilitate construction of affordable housing.

The Covenant and its Origins

The Covenant originated in 1960, when Sylvania Electric Products, Inc. ("Sylvania") petitioned the City to reclassify 153.6 acres along what is now Wells Avenue from a residential to a limited manufacturing (or "LM") district under the City's zoning ordinance (the "Ordinance"). At the time, Sylvania sought to develop the property as a large, single-user industrial/ manufacturing site. The City convinced Sylvania to accept the Covenant, which contained restrictions that were identical to those for the proposed LM district, because the City wanted to be able to enforce the LM restrictions on the Sylvania land even if a court were to invalidate the rezoning as illegal "spot zoning."[2]

The Covenant was formalized in May 1969. It is included in a deed to a 30.5-acre slice of the

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[2] A fuller history of the Covenant and its use as a defense against spot-zoning litigation appears in *Sylvania Electric Products, Inc. v. City of Newton*, 344 Mass. 428 (1962).

original Sylvania parcel, land the City purchased in 1969. As page 9 of the Decision notes, the Covenant reads like a zoning bylaw. The Covenant limits the total floor area of buildings along Wells Avenue. It caps the amount of office space. It imposes open-space requirements. It mandates building setbacks. It restricts building heights. It also prohibits any use of the Wells Avenue properties not allowed under the Ordinance in the LM District, that is, it limited the uses to industrial and light manufacturing uses, with limited exceptions for office space.

Administration of the Covenant has fallen to the City departments and officials that are responsible for regulating land use in Newton. These include the City's director of planning and development, the City's engineering department, and the City's building commissioner. The latter gives opinions as to what the Covenant does and does not allow, just as he does when administering the Ordinance.

The Covenant Amendments: Mini-Zoning

In 1971, only two years after the recording of the Covenant, and with Sylvania having abandoned its plans for the area, a successor owner asked the City to approve the first of a series of uses along Wells

Avenue that are not allowed under the Covenant. The City chose to deal with this request, and more than eighteen subsequent requests over the last 45 years, through what the City called "amendments" to the Covenant (the "Covenant Amendments").

The Covenant says nothing about amendments. It has no mechanism for adopting them. The City nevertheless created an ad hoc process for approving Amendments, a process that mirrors what the Ordinance requires for the issuance of special permits:

- As they would to obtain a special permit, developers wishing to build something on Wells Avenue that is not allowed "as of right" under the Covenant must apply to the City's Board of Alderman for an Amendment. The Board is the City's special-permit granting authority.

- Upon receiving an Amendment application, the Board refers it to the Board's "Land Use Committee," the same committee that reviews special-permit applications.

- As with special permits, the full Board must review and vote upon an Amendment application.

- As with special permits, the Board routinely imposes project conditions within Amendments.

As the Land Court recognized, there is no substantive difference between how the City uses Covenant Amendments and how it exercises its other discretionary zoning powers. Over the past 45 years, the City has used Amendments to allow incursions into

the Covenant's "no build" zones and to dramatically boost its caps on buildings and office space.

Most importantly, the City has used Amendments to allow departures from the Covenant's allowed "LM" uses. Through 1993, via Amendments, the City allowed various fitness facilities, a retail shop, and a food-service business to crop up on Wells Avenue. After 1993, the departures went further:

- In 1993, the City approved a religious school.
- In 2003, the City approved a for-profit gymnastics academy.
- In 2006, the City approved a for-profit dance school and a for-profit mathematics school.
- In 2012, the City approved a non-profit educational use.
- In 2013, the City approved a for-profit day care center.
- In 2014, the City approved a "place of amusement"/bouncy house.

Through Amendments, what the Covenant envisioned in 1960 as an industrial park has changed to a district replete with schools, clinics, and recreational centers. Industrial and manufacturing uses — if they ever existed - don't exist on Wells Avenue, and would be antithetical to those who are there now.

The City Rejects Affordable Housing on Wells Avenue

In May 2014, 135 Wells sought a comprehensive permit under c. 40B, §§ 20-23, to build an affordable-housing Project. 135 Wells asked that the permit approve a Covenant Amendment allowing residential use of 135 Wells, since despite 43 years of Amendments, the Covenant still banned residential uses.

The ZBA held six hearings on 135 Wells's 40B application. During the hearings, the City's Law Department opined that Covenant Amendments either were "conveyances" of City real estate that are subject to G.L. c. 40, § 3, or were "transfers" of City real property subject to c. 40, § 15A. There is no evidence in any of the Amendments that the City considered them to be subject to § 3 or § 15A. Moreover, had the Amendments been subject to § 3, they also would have been subject to the Uniform Procurement Act, G.L. c.30B, § 16. The City has never followed the Act in approving Covenant Amendments.

In December 2014, citing the Law Department's opinion, the ZBA voted that it did not have authority to approve a Covenant Amendment. The ZBA then voted 2-2-1 on 135 Wells's application, thereby denying it.

IV. Issues of Law Raised by the Appeal and Preserved in the Lower Court

A. Whether the Land Court erred in holding that amendments of the City's restrictive covenant governing the Wells Avenue neighborhood are not a "permit or approval" that a local zoning board and the Housing Appeals Committee may grant under G.L. c. 40B, §§ 21 and 23, to allow the construction of affordable housing on Wells Avenue.

B. Whether the Land Court erred in granting the City of Newton's cross-motion for judgment on the pleadings, upholding the enforceability of the Wells Avenue restrictive covenant, where there were disputed issues of fact regarding the utility of the covenant and the City's stated reasons for preserving it in the face of Newton's need for affordable housing.

135 Wells raised Issue A in its motion for judgment on the pleadings in the Land Court. 135 Wells raised Issue B at oral argument on the City's cross-motion for judgment on the pleadings. The Decision addresses Issue A, but not Issue B.

V. Covenant Amendments are "permits and approvals" within the meaning of c. 40B, §§ 21 and 23.[3]

Chapter 40B gives local zoning boards the "same power to issue permits or approvals as any local board or official who would otherwise act with respect to [a

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[3] This section briefly sets forth 135 Wells's arguments as to Issue A, the issue that merits direct appellate review. Should 135 Wells prevail as to the first issue on appeal, Issue B will be moot.

development permit] application…." G.L. c. 40B at § 21; *see also id.* at § 23 (granting same power to HAC). Covenant Amendments are "permits or approvals" under chapter 40B because the City's Board of Aldermen and the City's Mayor - officials whose permitting decisions are otherwise subordinate to chapter 40B -- repeatedly have used Covenant Amendments to approve non-residential developments on Wells Avenue. Sections 21 and 23 extend that same power to local zoning boards and HAC if a developer proposes to build affordable housing.

The Land Court made three errors in concluding that §§ 21 and 23's phrase "permits and approvals" does not reach Covenant Amendments. First, the Land Court ignored the plain meaning of the words "permit or approval." Second, contrary to two decisions of this Court, the Land Court failed to construe "permit or approval" in a "functional" manner, *see Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 76 (2003), when analyzing the Covenant Amendments. Third, the Land Court erred by declaring, without analyzing the pertinent statutory language, that Covenant Amendments are a "conveyance,"

"abandonment," or "transfer" of municipal real property subject to c. 40, §§ 3, 15, or 15A.

A. Chapter 40B's phrase "permits or approvals" must be construed broadly.

"[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001).

The plain meanings of "permit" and "approval" as used in §§ 21 and 23 are broad, and encompass the Covenant Amendments. A "permit" is, simply, "1. An authoritative or official certificate or permission; license; 2. a written order granting special permission to do something; 3. permission." Dictionary.com (2016), *available at* http://www.dictionary.com. An "approval" is "1. The act of approving; 2. Formal permission or sanction." *Id.*[4]

If the plain meanings of "permit" and "approval" are not broad enough to cover Covenant Amendments, both words must be construed liberally, as chapter 40B is a remedial statute. *See Town of Middleborough v.*

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[4] This Court has used dictionary definitions to discern the plain meaning of statutory terms. *See Commonwealth v. Boucher,* 438 Mass. 274, 276 (2002).

Housing Appeals Committee, 449 Mass. 514, 526 (2007). Chapter 40B "was intended to remove various obstacles to the development of affordable housing, including regulatory requirements that [have] been utilized by local opponents as a means of thwarting such development in their towns." *Dennis Housing Corp.*, 439 Mass. at 76. In *Bd. of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 347-55 (1973), this Court held that the Legislature chose Chapter 40B's words carefully when it determined that, in the face of an unjustified local denial of a comprehensive permit, HAC "shall direct the [local] board to issue a comprehensive permit or approval to the applicant." If Covenant Amendments are "permits or approvals," chapter 40B dictates that they are subject to the ZBA and HAC's override powers.

B. A Covenant Amendment functions as a "permit or approval" under Chapter 40B.

In addition to ignoring the plain meanings of "permit or approval," the Land Court sidestepped its responsibility to undertake a "functional analysis--not a name matching exercise [--]" in analyzing the status of Covenant Amendments under chapter 40B. *Dennis Housing Corp.*, 439 Mass. at 79. In *Zoning*

Board of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35, 40 (2008), this Court held that the phrase "permits or approvals" has a functional meaning:

> The phrase "permits or approvals," read in the context of the entire Act, refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward.

Covenant Amendments contain *Groton*'s four earmarks of a "permit or approval" under chapter 40B:

(1) Each Amendment begins with an "application" to a "local board," the Aldermen.

(2) Each Amendment receives "evaluation by" the Land Use Committee and the Aldermen.

(3) Each Amendment is "typical" for development not allowed as of right along Wells Avenue.

(4) Each Amendment addresses fundamental zoning concerns: the regulation of structures and uses.

Instead of examining whether Covenant Amendments function as "permits and approvals," the Land Court seized on dicta in *Sylvania Electric Products, Inc.*, 344 Mass. at 436, that the Covenant's provisions "are not zoning restrictions...." *Sylvania* accurately characterizes the Covenant, but it could not (and does not) describe the Covenant Amendments. *Sylvania*

predates the first Covenant Amendment by nine years, and since the Covenant itself is silent about amendments, *Sylvania*'s analysis of the Covenant could not have encompassed the Amendments. *Sylvania* thus does not control whether Covenant Amendments are a "permit or approval" within the meaning of c. 40B.

C. The City could approve (and did approve) Covenant Amendments without invoking any municipal power under chapter 40.

The Land Court held that Covenant Amendments were not subject to c. 40B's override for "permits or approvals" because

> [t]he Legislature regulates the municipal power to convey, transfer, or abandon any interest in municipal property through the mandatory proceeding [sic] of G.L. c. 40, §§ 3, 15, 15A. The Aldermen's various exercises of their authority to amend or waive the City's property interest in the [Covenant] were made pursuant to G.L. c. 40.

Decision at 9-10. While the Land Court highlighted three potential sources of the City's power to approve Covenant Amendments, the court failed to say which one worked. A careful reading of §§ 3, 15 and 15A shows that none applies to Covenant Amendments.

Chapter 40, § 3 provides in part: "A town may hold real estate for the public use of the inhabitants *and may convey the same* by a deed of its selectmen

thereto duly authorized…." (Emphasis added.[5]) A Covenant Amendment does not "convey" City real estate:

> A conveyance is defined as: "to transfer or deliver (something as a right or property) to another, esp. by deed or other writing; esp., to perform an act that is intended to create one or more property interests, regardless of whether the act is actually effective to create those interests."

In re Hildebrandt, 320 B.R. 40, 44-45 (1st Cir. Bankr. App. P. 2005) (construing G.L. c.188, § 7(1) and quoting Black's Law Dictionary 357 (8th ed. 2004)). A Covenant Amendment does not "transfer" or "deliver" City real estate into the hands of another, nor does it create in the benefitted developer an interest in real estate. The "conveyance" theory of Amendments thus fails.

Covenant Amendments also do not fit under c. 40, § 15 or § 15A. Section 15 addresses abandonment of municipal rights in realty. 135 Wells applied for relief from the Covenant's residential prohibition. It did not ask the City to "abandon" its interests under the Covenant, and none of the other Covenant Amendments releases another Wells Avenue parcel from the Covenant. As for § 15A, that section governs

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[5] General Laws c. 39, § 1 gives boards of aldermen the "conveyance" powers described in c. 40, § 3.

transfers of municipal land dedicated to one purpose and one municipal department (say, a playground run by a parks department) to another municipal department for a different purpose (say, a fire station). Amendments involve no such inter-municipal transfer.

The City did not follow §§ 3, 15 or 15A in approving Amendments because it did not have to. Under the Restatement (Third) of Property (Servitudes), § 7.1 (2000), the City may modify or amend the Covenant by a simple act of agreement:

> A servitude may be modified or terminated by agreement of the parties, pursuant to its terms, or under the rules stated in this Chapter.[6]

Consistent with the Restatement, several Covenant Amendments describe the City as merely "agreeing to amend" the Covenant. By contrast, none of the Covenant Amendments describes the City's action as a "conveyance," a "transfer," or a "delivery" of City real estate. Most tellingly, ***the City never complied with (or recited compliance with) c. 40 in granting any of the Covenant Amendments.*** The City likewise never complied with the Uniform Procurement Act,

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[6] This Court looks to the Restatement for guidance regarding common-law restrictive covenants. *See, for example, Patterson v. Paul*, 448 Mass. 658, 663 (2007).

c. 30B, or the City's ordinances pertaining to disposition of City real property, in approving any of the Covenant Amendments.

The substance of a Covenant Amendment does not involve a "conveyance", "transfer", or "abandonment" of a municipal interest in real property under c. 40. Instead, Amendments reflect, simply, the City's agreement not to enforce the Covenant as to a specific structure or use. Zoning permits have the same effect. As such, c. 40B's broad terms -- "permit or approval" -- must be construed to include Amendments.

VI. Why Direct Appellate Review is Appropriate

A. This appeal presents two questions of first impression - one under Chapter 40B, and another under Chapter 40 -- that this Court should finally determine.

The first novel question in this case is whether amendments to a municipally held restrictive covenant qualify as "permits or approvals" under c. 40B, §§ 21 and 23, and if so, under what circumstances. The Land Court did not answer the question of statutory interpretation presented in this case, the meaning of "permit or approval." This Court's decisions are clear that "permits or approvals" includes more than "zoning" approvals. *See Hanover*, 363 at Mass. 354-55.

It is equally clear that "permits or approvals" does not include grants by municipalities of easements across their property. *See* Groton, 451 Mass. at 37. But this Court has not decided where amendments to restrictive covenants, granted through zoning-like procedures, fall on the spectrum between *Hanover* and *Groton*.

The second novel question is whether amendments to a restrictive covenant are subject to c. 40, §§ 3, 15, or 15A (and, by extension, c. 30B, § 16). The Land Court held that at least one of those sections applied, even though the City never cited them (or complied them) in its 45 years of approving Amendments. The c. 40 question is important not only to the parties in this case, but also those who are parties to other municipally held covenants.

B. This appeal addresses the legality of a new threat to the public interest in construction of affordable housing, one that merits a final determination by this Court.

Chapter 40B "was intended to remove various obstacles to the development of affordable housing, including regulatory requirements that had been utilized by local opponents as a means of thwarting such development in their towns." *Dennis Housing*

Corp., 439 Mass. at 76.[7] In taking case after case under chapter 40B on its own initiative (*see, for example, Lunenburg,* 464 Mass. at 39; *Amesbury,* 457 Mass. at 754), or on petition for direct review (*see, for example, Hingham*, 438 Mass. at 365; *Wellesley*, 436 Mass. at 818), this Court has recognized chapter 40B's critical role in the development of affordable housing in the Commonwealth.

The Decision blesses a new way for municipalities to thwart the development of affordable housing. Recall that in 1960, the City forced Sylvania to accept the Covenant so as to inoculate the City from charges of "spot-zoning." Municipalities have multiple opportunities outside of rezoning efforts to ask owners of developable land to accept restrictive covenants -- covenants that do not convey a fee or an affirmative easement to a municipality, but which do

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[7] *See also Hanover*, 363 Mass. at 353-354; *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments L.P.*, 436 Mass. 811, 814, 815 (2002); *Planning Bd. of Hingham v. Hingham Campus, LLC*, 438 Mass. 364, 369-70 (2003); *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 29 (2006); *Bd. of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581, 582-83 (2008); *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270 (2008); *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 761-762 (2010); *Zoning Bd. of Appeals of Lunenberg v. Housing Appeals Committee*, 464 Mass. 38, 40 (2012).

grant the municipality the power to restrict what occurs on private property.

In the wake of the Decision, municipalities could request and impose restrictions, as the City did here, that look, feel and act like zoning -- restrictions that the municipality can use, through "amendments," to allow uses that are politically popular, but which remain unalterable when the proposed use is affordable housing. Under the logic of the Decision, such a restriction exempts the affected parcel entirely from c. 40B. The public interest requires a final ruling from this Court as to whether zoning powers that masquerade as "covenant amendments" truly are exempt from chapter 40B's grant to local zoning boards and HAC of the power to grant all "permits or approvals" necessary for the construction of affordable housing.

Conclusion

For the reasons stated herein, this Court should grant 135 Wells Avenue LLC's petition for Direct Appellate Review.

135 WELLS AVENUE, LLC

By its attorneys,

/s/ Michael D. Vhay
Michael D. Vhay (BBO #566444)
Valerie A. Moore (BBO #684849)
FERRITER SCOBBO & RODOPHELE, PC
125 High Street, 26th Floor
Boston, MA 02110
(617) 737-1800
mvhay@ferriterscobbo.com
vmoore@ferriterscobbo.com

Dated: December 12, 2016

Certificate of Service

I hereby certify that a true copy of the above document was served upon counsel of record for all parties by mail this 12th day of December, 2016.

/s/ Valerie A. Moore
Valerie A. Moore, Esq.

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EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss

PERMIT SESSION CASE
NO. 16 PS 000034 (RBF)

135 WELLS AVENUE, LLC,

Plaintiff,

v.

HOUSING APPEALS COMMITTEE; BROOKE K. LIPSITT, VINCENT FARINA, TREFF LAFLECHE, MICHAEL ROSSI AND BARBARA HUGGINS, AS THEY ARE MEMBERS OF THE NEWTON ZONING BOARD OF APPEALS; AND THE CITY OF NEWTON,

Defendants.

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING DEFENDANTS' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

135 Wells Avenue, LLC (Wells Avenue) owns a parcel located at 135 Wells Avenue, Newton, Massachusetts (Site) that it seeks to develop as affordable housing (Project) under G.L. c. 40B, §§ 20-23 (c. 40B). The Site is subject to restrictions enforceable by the City of Newton (City) that limit the use of the Site and surrounding sub-parcels to certain light manufacturing and commercial uses along with other restrictions on development. Wells Avenue has brought this action pursuant to G.L. c. 30A on appeal from the Housing Appeals Committee's (Committee's) Summary Decision to affirm the Zoning Board of Appeals for the City of Newton's (Board's) denial of its application for an amendment or waiver of the

restrictions to allow the construction of the Project. On these cross-motions for judgment on the pleadings, the Court finds that the City's modifications of the restrictions do not change the fact that the restrictions are a municipal interest in real property, and neither the Board nor the Committee has the authority to modify or waive them under c. 40B. The Court finds further that changed conditions at or in the vicinity of the Site have not rendered the restrictions unenforceable.

Procedural History

On May 27, 2014, Wells Avenue applied for a comprehensive permit with the Board, pursuant to c. 40B. Administrative Record (A.R.) at 72. In conjunction with the permit application, Wells Avenue also filed a petition with the Board of Aldermen (Aldermen) for a waiver, amendment, or release from certain deed restrictions on the Site. A.R. at 72. Public hearings were held on June 25, October 28, and November 10, 2014; the petition was denied on November 17, 2014. A.R. at 72-73. The City's law department advised the Board that it lacked authority under c. 40B to amend, waive, or release the restrictions because they amounted to an interest in land held by the municipality, and it voted to deny the application. A.R. at 73-74. The Board's decision was filed with the City Clerk on January 16, 2015. A.R. at 74.

On December 29, 2014, Wells Avenue filed its appeal with the Committee. A.R. at 521. On appeal, the Board asserted as its sole contention that it has no authority to amend or waive the deed restrictions at issue because the amendment or waiver is not a local "permit or approval" within the meaning of G.L. c. 40B, § 21. A.R. at 52, 781. The Committee's presiding officer conducted an oral argument session on October 20, 2015, and in its Summary Decision, dated December 15, 2015, the Committee affirmed the Board's decision. A.R. at 52, 65.

On January 14, 2016, pursuant to G.L. c. 30A, § 14, Wells Avenue filed its Complaint seeking judicial review of the Committee's decision to affirm the Board. The parties filed their Joint Statement on February 5, 2016, and a case management conference was held on February 12, 2016. Wells Avenue filed its Motion for Judgment on the Pleadings and Memorandum in Support of its Motion for Judgment on the Pleadings (Pl. Mot.) on April 1, 2016. The Board and the City of Newton responded with their Oppositions to Wells Avenue's Motion for Judgment on the Pleadings and Cross-Motions for Judgment on the Pleadings on May 2, 2016 (City Cross-Mot.). The Committee filed its Cross-Motion for Judgment on the Pleadings and its Brief in Opposition to Wells Avenue's Motion for Judgment on the Pleadings and in Support of Cross-Motion for Judgment on the Pleadings (Comm. Br.) on the same date. Wells Avenue filed its Reply in Support of its Motion for Judgment on the Pleadings and Opposition to Cross-Motions for Judgment on the Pleadings (Pl. Reply) on May 16, 2016. The Court heard the cross-motions on June 7, 2016, and took them under advisement. This memorandum and order follows.

Standard of Judicial Review under G.L. c. 30A, § 14

Decisions of the Committee are reviewed "in accordance with the provisions of chapter thirty A." G.L. c. 40B, § 22. Judicial review under G.L. c. 30A, § 14, "shall be confined to the record" except in limited situations not present in this case. G.L. c. 30A, §§ 14(5), (6). The Court may "set aside or modify" the agency decision "if it determines that the substantial rights of any party may have been prejudiced because the agency decision is . . . [b]ased upon an error of law . . . or otherwise not in accordance with law." G.L. c. 30A, § 14(7); see *Zoning Bd. of Appeals of Sunderland* v. *Sugarbush Meadow, LLC*, 464 Mass. 166, 172 (2013). In reaching its decision, the Court "shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it."

Board of Appeals of Woburn v. *Housing Appeals Comm.*, 451 Mass. 581, 590 (2008), quoting G.L. c. 30A, § 14(7).

Undisputed Facts

Based on the pleadings and the administrative record, the following facts are undisputed or deemed admitted.

1. Wells Avenue's application to the Board described the Project, to be built at 135 Wells Avenue, Newton, MA on the Site, a 6.3 acre sub-parcel located in a limited manufacturing district under the City's Zoning Ordinance (Ordinance). A.R. at 53.
2. Residential uses are prohibited in the limited manufacturing district. A.R. at 53.
3. The Project consists of 334 rental units, of which 84 will be affordable housing serving households at or below 80% of area median income. A.R. at 53.
4. The Site is a sub-parcel of a 153.6 acre parcel (Parcel 1) which was reclassified by the Ordinance from a single residence A district to a limited manufacturing district on June 27, 1960. A.R. at 53. The reclassification resulted in litigation that was resolved in *Sylvania Elec. Prods., Inc.* v. *Newton*, 344 Mass. 428 (1962). See *id.* at 437.
5. In 1960, Sylvania Electric Products (Sylvania) had an option to purchase a parcel of land in Newton containing 180 acres. A.R. at 53. At that time, Sylvania petitioned the Aldermen to reclassify a portion of that parcel, comprising Parcel 1, from residential to limited manufacturing. A.R. at 53. Sylvania also discussed with the City executing an option agreement whereby the City could purchase from Sylvania a 30.5-acre sub-parcel of Parcel 1 (Parcel 2) that would be restricted in use and would hold restrictions on Parcel 1. A.R. at 53-54.

6. When the Aldermen approved the Ordinance, they authorized the mayor to accept the proposed option agreement for Parcel 2. *Sylvania*, 344 Mass. at 429-32; A.R. at 54.
7. Following the Ordinance's enactment, Sylvania took title to the 180-acre parcel and executed the option agreement granting the City an option to purchase Parcel 2. A.R. at 54. The option agreement was executed on July 6, 1960 and recorded at the Middlesex (South) Registry of Deeds (registry) in Book 9630, Page 48 on July 8, 1960. A.R. at 332-37.
8. The Ordinance was challenged by abutting landowners, but in *Sylvania*, the Supreme Judicial Court (SJC) upheld the Board's reclassification of Parcel 1. *Sylvania*, 344 Mass. at 437; A.R. at 53-54.
9. In 1969, Newton exercised its option on Parcel 2, and a deed from Sylvania's successor-in-interest conveyed Parcel 2 to the City. A.R. at 54. The deed was executed on May 22, 1969 and recorded at the registry in Book 11699, Page 535 on June 26, 1969. It provides that Parcel 2 is subject to restrictions for the benefit of Parcel 1 for 99 years from the date of execution prohibiting the construction of buildings or structures except for recreation, conservation, or parkland purposes, and also allows for fences. A.R. at 54, 117.
10. The 1969 deed also restricts Parcel 1 for the benefit of Parcel 2 for 99 years, beginning on December 1, 1968 (Restrictions). A.R. at 118. The Restrictions include the following: limiting the floor area of buildings to be constructed on the premises; requiring that a percentage of the ground area be maintained in open space not occupied by buildings, parking areas, or roadways; imposing setbacks, height restrictions, and a buffer zone; restricting the number and type of signs and the type of lighting; and limiting the use of

buildings to certain, but not all, of the uses permitted in a limited manufacturing district. A.R. at 54, 118-22.

11. The Restrictions further provide that the Aldermen must give prior approval with respect to finished grading and topography, drainage, parking, and landscaping before any building or structure can be erected on Parcel 1 or one of its sub-parcels. A.R. at 54-55, 118.

12. There have been at least 19 orders of the Aldermen between 1971 and 2014 granting waivers and amendments to the Restrictions leading to various uses of parts of Parcel 1, including: a tennis club, skating facility, squash and racquetball facility, tennis and fitness club; health club, health research and monitoring center, retail shop and food service area, whirlpool, gymnastics academy, dance school, for-profit mathematics school, day care center, "bouncy house" amusement center, religious educational use, an increase in the amount of allowed office space "floor to area" ratio, and an allowance for construction partially within the no-build area. A.R. at 55, 123-56. Of the 19 orders included in the administrative record, four orders make the Board's approval contingent on the petitioner recording the plan approval at the registry, 11 orders authorize the mayor to execute such recordable documents as necessary to give the Aldermen's orders effect, and four orders make no reference to the recordation of any document. A.R. at 123-56.

13. Current uses on Parcel 1 include the Russian School of Mathematics, the Solomon Schecter Day School, Newton-Wellesley Hospital's Ambulatory Care Center, the Massachusetts School of Professional Psychology, the Newton Childcare Academy, New England Cable News, Exxcel Gymnastics and Climbing Center, Valeo Sports Center, Upromise, and Neurocare Inc. Sleep. A.R. at 55.

14. In addition to their legislative authority, the Aldermen act as the City's special-permit granting authority. A.R. at 299-301.

Discussion

In its Motion for Judgment on the Pleadings, Wells Avenue alleges that the amendments or waivers of the Restrictions that the City regularly grants are local "permit[s] or approval[s]" under c. 40B that may be waived by the Board. Pl. Mot. at 10-11. Alternatively, Wells Avenue argues that the Restrictions are not enforceable because of changed conditions at the Site and Parcel 1 that undermine the purpose for which the Restrictions were granted. Pl. Mot. at 11. These arguments are addressed in turn.

I – Whether the Amendment or Waiver is a c. 40B "Permit or Approval"

The Restrictions are a property interest of the City; they cannot be transformed into a zoning restriction that can be amended or waived under c. 40B. *Zoning Bd. of Appeals of Groton* v. *Housing Appeals Comm.*, 451 Mass. 35, 40 (2008) ("An order directing the conveyance of an easement, however, cannot logically or reasonably derive from, or be equated with, a local board's power to grant 'permits or approvals.'"); see *Sylvania*, 344 Mass. at 434 (distinguishing option restriction on deed from simultaneous zoning decision to classify same parcel as limited manufacturing district); *Killorin* v. *Zoning Bd. of Appeals of Andover*, 80 Mass. App. Ct. 655, 658 (2011) (distinguishing restrictions created by deed, instrument, or will under G.L. c. 184, § 23 from those created by a board granting a special permit and governed by G.L. c. 40A); see also *Town of Brookline* v. *MassDevelopment Fin. Agency*, No. 14-P-1817, 2015 Mass. App. Ct. LEXIS 928, at *2 (Mass. App. Ct. Sept. 25, 2015) (unpublished decision) (holding that a deed restriction entered into by the parties incidental to property owner's request for a change in town zoning by-law "does not alter the essential nature of the instrument itself").

In *Sylvania*, the SJC determined that the Restrictions on Parcel 1 are a property interest, not a zoning restriction. *Sylvania*, 344 Mass. at 434-35. The SJC found that while the City induced Sylvania to include the option restrictions in the deed, the zoning change simply reclassified land already so restricted by that deed. See *id.* at 434. As the SJC stated, "[i]t does not infringe zoning principles that, in connection with a zoning amendment, land use is regulated otherwise than by the amendment. Zoning regulations . . . exist unaffected by, and do not affect, deed restrictions." *Id.* While it is true, as Wells Avenue alleges, that "the Restrictive Covenant arose in the context of the City's decision to re-zone the Sylvania parcel," Pl. Mot. at 16, this context does not change the SJC's holding that zoning restrictions are distinct from restrictions on a property interest. *Sylvania*, 344 Mass. at 434-35.

Notwithstanding *Sylvania*, Wells Avenue argues that in granting the numerous amendments and waivers to the restrictions between 1971 and 2014, the Aldermen, as a "local board," used the amendments and waivers as land-use "permits or approvals" under G.L. c. 40B, § 21, and thus the Board had the authority under c. 40B to grant an amendment or waiver. Pl. Mot. at 13-15. Wells Avenue points to the text of the statute, which states:

> The board of appeals . . . *shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application*, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials.

G.L. c. 40B, § 21 (emphasis added). Wells Avenue asserts that the Aldermen compose the type of local board "whose approval [through covenant amendments or waivers] would otherwise be required for a housing development to go forward." *Groton*, 451 Mass. at 40; Pl. Mot. at 13-14. In effect, Wells Avenue is making an "if it walks like a duck and quacks like a duck" argument: if the Alderman act like a zoning board in waiving and amending the Restrictions, they should be

treated as one for the purposes of c. 40B, and their waivers of the Restrictions should be subject to the Board's authority to issue permits and waive other regulations under c. 40B.

The Aldermen do act as the City's special-permit granting authority and the Restrictions on the Site do govern typical land-use issues such as those illustrated in the statute. However, these functional similarities do not erase the division between the Aldermen's authority to control the City's property interests and their permitting authority. It is only their permitting authority that is subject to waiver under c. 40B. *Zoning Bd. of Appeals of Amesbury* v. *Housing Appeals Comm.*, 457 Mass. 748, 749 (2010). "[U]nder § 21, the local zoning board's power to impose conditions . . . is limited to the types of conditions that the various local boards in whose stead the local zoning board acts might impose, such as those concerning matters of building construction and design, siting, zoning, health, safety, environment, and the like." *Id.*; see *Groton*, 451 Mass. at 41 (stating that c. 40B only reaches local permitting barriers, not restrictions imposed by G.L. c. 40, §§ 3, 15A on the conveyance of municipally-held easements); see also *Town of Brookline*, 2015 Mass. App. Ct. LEXIS 928 at *2-3 (distinguishing a deed restriction governed by G.L. c. 184, § 23 from a rezoning amendment as an exercise of municipal police power).

The claim that the Legislature intended c. 40B to be read broadly and remove local impediments to affordable housing only reaches as far as other statutes constrain it. See *Dennis Housing Corp.* v. *Zoning Bd. of Appeals*, 439 Mass. 71, 80 (2003) (stating that c. 40B is meant to override local obstacles to affordable housing development, not State law that is general in its implementation and application). The Legislature regulates the municipal power to convey, transfer, or abandon any interest in municipal property through the mandatory proceeding of G.L. c. 40, §§ 3, 15, 15A. The Aldermen's various exercises of their authority to amend or waive

the City's property interest in the Restrictions were made pursuant to G.L. c. 40. However formal or informal those acts were, they were not exercises of the Aldermen's permitting or zoning authority that are subject to waiver under c. 40B. The Board therefore lacked the authority to, in effect, step into the shoes of the Aldermen and grant a "permit or approval" in the form of a waiver of the Restrictions. See *Blakeley* v. *Gorin*, 365 Mass. 590, 595 (1974) ("The settled law of this Commonwealth is that deed restrictions of this type are a property interest in land."); Restatement (Third) of Property (Servitudes), § 1.1(1), (3) (2000) ("A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land. . . . Zoning and other public land use regulations . . . are not servitudes within the meaning of the term as used in this Restatement."). In other words, even if the Aldermen walk and talk like a zoning board with respect to the Restrictions, the Restrictions are still a property interest not subject to c. 40B, and the Aldermen's actions do not create a regulatory regime that subjects the Restrictions to the Board's waiver power under c. 40B. [1]

Having established that the Restrictions are a property interest outside the purview of c. 40B, this Court need not reach Wells Avenue's assertion that if the amendments and waivers were conveyances of a municipal interest in property, they were conveyed illegally. See Pl. Mot. at 20 (alleging that the Aldermen failed to follow G.L. c. 30B, §§ 16(a),16(b) and Section 2-7 of the Newton Ordinances). Regardless of the legality of the amendment and waiver procedures, it does not alter the nature of the Restrictions or the Board's inability to waive or amend them.

[1] Wells Avenue's reliance on *Dennis Housing Corp., v. Zoning Bd. of Appeals*, 439 Mass. 71 (2003) is therefore misapplied. The SJC in *Dennis* held that a statutorily authorized, locally administered regional historic district and commission was "local" in nature and thus under the purview of c. 40B. Wells Avenue cites this case as an example of a State law falling under c. 40B. However, the historic committee at issue in *Dennis* was created by a special act that gave it the authority of a local board. *Id.* at 73-74. G.L. c. 40 applies generally to every municipality in the Commonwealth.

Furthermore, the Committee properly understood its limited authority to review the actions of the Board. See G.L. c. 40B, § 23 (limiting Committee authority to deciding whether board of appeals decisions impose "uneconomic" conditions or are "consistent with local needs"). The Committee has "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application," G.L. c. 40B, § 21, and the authority to override local regulations only when they impose "uneconomic" conditions or are not "consistent with local needs" as defined in G.L. c. 40, § 20. *Groton*, 451 Mass. at 40; see *Dennis*, 439 Mass. at 77. Wells Avenue's appeal was on the grounds that the Board erred when it found it did not have the authority to waive the Restrictions. The Committee properly denied the appeal on the ground that the Board was correct that it did not have such authority, and therefore, the Committee did not have the power to issue the permit where the Board could not.

As the Committee noted, although State law recognizes the distinction between deed restrictions and zoning restrictions, the Committee must be sensitive to potential situations in which a municipality restricts a property interest to impede c. 40B affordable housing development. See A.R. at 64-65; Comm. Br. At 17-19. In *Chelmsford* v. *Di Biase*, 370 Mass. 90 (1976), the SJC found that the municipal taking of a proposed c. 40B property was done in good faith and was initiated before the developer submitted its application for a c. 40B comprehensive permit, and thus did not fall under the board of appeals' or the Committee's authority. *Id.* at 91-92. The Court explicitly reserved its authority to reach a different conclusion if presented with a future situation "in which good faith or public purpose is negated." *Id.* at 95. In this case, because the restrictions on the Site were granted based on an option agreement that predated c. 40B's enactment in 1969, there is no bad faith present, and this Court's holding does not reach such a situation.

II – Whether the Deed Restriction is Unenforceable due to Changed Conditions.

Wells Avenue claims in the alternative that the Restrictions should be declared unenforceable because they were never enforced and are antithetical to Parcel 1's current uses. Pl. Mot. at 22-24. Further, it asserts that the City does not derive a benefit from the restrictions nor has it claimed one. Pl. Reply at 13. In their cross-motion, the City and the Board counter that while Parcel 1's uses have shifted to a commercial nature as the economy has evolved, the Aldermen have never amended or waived the Restrictions to allow a residential use, and they still confer a benefit. City Cross-Mot. at 21-22.

General Laws c. 184, § 30 states that even where the dominant estate still derives an "actual and substantial benefit" from the restriction,

> [n]o restriction determined to be of such benefit shall be enforced or declared to be enforceable . . . if (1) changes in the character of the properties affected or their neighborhood . . . reduce materially the need for the restriction or the likelihood of the restriction accomplishing its original purposes or render it obsolete or inequitable to enforce except by award of money damages.

In determining whether conditions have changed to such an extent, the law looks to whether enforcement of the restriction would be "merely quixotic – failing to serve the grantor's original purpose and impeding present desirable and feasible uses." *Cogliano* v. *Lyman*, 370 Mass. 508, 512 (1976); see *McArthur* v. *Hood Rubber Co.*, 221 Mass. 372, 376 (1915) ("The change in the character of the neighborhood is so radical that it seems plain that there can be no further life in the restriction."); *Jackson* v. *Stevenson*, 156 Mass. 496, 502 (1892) (finding that the purpose for which the restriction was originally granted "can no longer be accomplished").

The Restrictions and the negotiations that resulted in their execution demonstrate that the City intended Parcel 1 to be a non-residential area. Not only do the Restrictions prohibit residential uses on any sub-parcel comprising Parcel 1, but the agreement with Sylvania was

expressly predicated on Sylvania ceding three acres to be kept as a residential district and increasing the depth of a strip of land on Nahanton Street within the residential district from 140 feet to 180 feet. *Sylvania*, 344 Mass. at 430-32. In creating a general plan for this area, the City considered how best to balance residential and non-residential uses, and the restrictions secure that benefit. See *id.* at 431 (finding that the purpose of the option agreement was to give the city a dominant estate by which it could enforce the restrictions).

The City and the other servient estates on Parcel 1 still benefit from the Restrictions. While Parcel 1 has evolved away from a limited manufacturing use, it does not and has never had a residential use. In that way, Parcel 1 is different from the parcels in *Cogliano*, which were restricted to residential use but became entirely surrounded by industrial and office buildings and an expanded Route 128. *Cogliano*, 370 Mass. at 511. Further, in contrast to a process where "said restriction has been for a long time entirely disregarded and universally violated by nearly all, if not all, the present owners," *McArthur*, 221 Mass at 375, the amendment or waiver process is a legally sanctioned procedure that put each applicant on notice of the as-of-right uses and the prohibited uses—namely, residential. Whether the day care center or "bouncy house" would find a metal casting plant offensive is speculative, but the waiver application process did or should have made them aware that its presence was more legally permissible than an apartment building. Even as amended, the Restrictions benefit the City and the other servient estates by concentrating certain commercial uses in one area. Thus, enforcement of the Restrictions is not "quixotic" and does not impede "present desirable and feasible uses." *Cogliano*, 370 Mass. at 512.

Conclusion

For the foregoing reasons, Wells Avenue's Motion for Judgment on the Pleadings is **DENIED**, and the Defendants' Cross-Motions for Judgment on the Pleadings are each **ALLOWED**. Judgment shall enter affirming the Committee's Summary Decision in favor of the Board and dismissing the complaint with prejudice.

SO ORDERED

By the Court (Foster, J.)

Attest:

_____

Deborah J. Patterson, Recorder

Dated: August 16, 2016

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
CASE DOCKET

CASE GROUP: Miscellaneous
CASE NO.: 16 PS 000034
CITY / TOWN: Newton
DESCRIPTION:

CASE STATUS : Closed

DATE FILED: 01/14/2016
CASE TYPE: Permit Session
ACTION CODE (S) G. L. c 40B, Sec. 22 Review by Housing Appeals Committee
OTHER COUNTS: 1
TRACK:
JUDGE: Foster, Robert B.

PLAINTIFF(S):	DEFENDANT(S):
135 Wells Avenue, LLC	Housing Appeals Committee Brooke K. Lipsitt Member of the Newton Zoning Board of Appeals Vincent Farina Member of the Newton Zoning Board of Appeals Treff LaFleche Member of the Newton Zoning Board of Appeals Michael Rossi Member of the Newton Zoning Board of Appeals Barbara Huggins Member of the Newton Zoning Board of Appeals City of Newton
Plaintiff's Attorney (s):	**Defendant's Attorney (s):**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
CASE DOCKET

01/14/2016 Michael D Vhay, Esq.
Ferriter Scobbo & Rodophele, PC
125 High Street
26th Floor
Boston, MA 02110
(617)737-1800
appears for 135 Wells Avenue, LLC

01/14/2016 Valerie A. Moore, Esq.
Ferriter Scobbo and Rodophele PC
125 High Street
26th Floor
Boston, MA 02110
(617)737-1800
appears for 135 Wells Avenue, LLC

02/05/2016 Pierce O Cray, Esq.
Office Of The Attorney General
One Asburton Place
Room 2019
Boston, MA 02108
(617)727-2200
appears for Housing Appeals Committee

02/05/2016 Suzanne P Egan, Esq.
Town of North Andover, Town Counsel
Town Hall
120 Main Street
North Andover, MA 01845
(978)794-1709
appears for Brooke K. Lipsitt Member of the Newton Zoning Board of Appeals

02/05/2016 Suzanne P Egan, Esq.
Town of North Andover, Town Counsel
Town Hall
120 Main Street
North Andover, MA 01845
(978)794-1709
appears for Vincent Farina Member of the Newton Zoning Board of Appeals

02/05/2016 Suzanne P Egan, Esq.
Town of North Andover, Town Counsel
Town Hall
120 Main Street
North Andover, MA 01845
(978)794-1709
appears for Treff LaFleche Member of the Newton Zoning Board of Appeals

02/05/2016 Suzanne P Egan, Esq.
Town of North Andover, Town Counsel
Town Hall
120 Main Street
North Andover, MA 01845
(978)794-1709
appears for Michael Rossi Member of the Newton Zoning Board of Appeals

02/05/2016 Suzanne P Egan, Esq.
Town of North Andover, Town Counsel
Town Hall
120 Main Street
North Andover, MA 01845
(978)794-1709
appears for Barbara Huggins Member of the Newton Zoning Board of Appeals

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
CASE DOCKET

	02/05/2016 Suzanne P Egan, Esq. Town of North Andover, Town Counsel Town Hall 120 Main Street North Andover, MA 01845 (978)794-1709 appears for City of Newton

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
CASE DOCKET

#	Entry	Date	Judge
1	Complaint filed in the Permit Session.	01/14/2016	
2	Case Assigned to the Average Track of the Permit Session.	01/14/2016	
3	Land Court miscellaneous filing fee Receipt: 339233 Date: 01/14/2016	01/14/2016	
4	Land Court surcharge Receipt: 339233 Date: 01/14/2016	01/14/2016	
5	Land Court summons Receipt: 339233 Date: 01/14/2016	01/14/2016	
6	Uniform Counsel Certificate for Civil Cases filed by Plaintiff.	01/14/2016	
7	Event Scheduled Event: Case Management Conference Date: 02/12/2016 Time: 11:00 AM (Notice Sent to Michael D. Vhay, Esq.) Result: Case Management Conference held	01/19/2016	FOSTER
8	Joint Statement, filed.	02/05/2016	
9	Summons returned to Court with service on Housing Appeals Committee filed. Served via certified and registered mail on January 19, 2016.	02/05/2016	
10	Summons returned to Court with service on City of Newton filed. Served via certified and registered mail on January 19, 2016.	02/05/2016	
11	Notice that the Constable served the original notice in hand to Defendant Dennis Carbone, husband to Barbara Huggins, on January 16, 2016	02/05/2016	
12	Notice that the Constable served the original notice in hand to Defendant Vincent Farina, on January 16, 2016	02/05/2016	
13	Case Management Conference Held The following event: Case Management Conference scheduled for 02/12/2016 11:00 AM has been resulted as follows: Result: Case Management Conference held. Attorneys Valerie A. Moore, Suzanne P. Egan, and Pierce O. Cray appeared. The parties are ordered to confer with clients and each other about the City of Newton's status as a defendant, and the binding effect of the judgment, and plaintiff and ZBA and City of Newton are ordered to confer about a possible resolution of the case. A Telephone Status Conference was scheduled for February 29, 2016 at 9:45AM to discuss the City of Newton's participation in the case, the binding nature of the judgment, whether further amendment of the pleadings is required, and whether the briefing schedule needs to be revised. The following schedule was set: The Housing Appeals Committee will file the administrative record by March 18, 2016. 135 Wells Avenue LLC will file its Motion for Judgment on the Pleadings by April 1, 2016. The City may also file a Motion to Dismiss by April 1, 2016 as well. All parties must file their oppositions and Cross-Motions for Judgment on the Pleadings by May 2, 2016. 135 Wells Avenue LLC will file any Reply Memorandum or Opposition to the Cross-Motions by May 16, 2016. A hearing on the Motions is set down for May 25, 2016 at 10:00AM. (Notice of docket entry sent to Attys. Moore, Vhay, Egan, and Cray)	02/12/2016	FOSTER
14	Scheduled Event: Motion Date: 05/25/2016 Time: 10:00 AM Result: Event Rescheduled.	02/17/2016	

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
CASE DOCKET

15	Scheduled Event: Telephone Conference Call Date: 02/29/2016 Time: 09:45 AM Result: Status Conference held.	02/17/2016	
16	Letter from Atty. Egan: "This is to inform the court that the City of Newton has reconsidered its position regarding filing a motion to dismiss in the above referenced matter. The City will not be filing a motion to dismiss but will participate fully in this action."	02/22/2016	
17	Event Resulted The following event: Motion scheduled for 05/25/2016 10:00 AM has been resulted as follows: Result: Event Rescheduled to June 7, 2016 at 10:30 am, at the request of counsel and by agreement of the court.	02/24/2016	FOSTER
18	Scheduled Event: Motion Date: 06/07/2016 Time: 10:30 AM (Notice sent to Attys. Moore, Vhay, Cray, and Egan) Result: Continued	02/24/2016	
19	Event Resulted The following event: Telephone Conference Call scheduled for 02/29/2016 09:45 AM has been resulted as follows: Result: Telephone Status Conference held. Attorneys Valerie A. Moore, Suzanne P. Egan, and Pierce O. Cray appeared. The City of Newton remains as a defendant. The parties are to follow the briefing schedule set at the last case management conference, except that the hearing on the motions for judgment on the pleadings has been continued to June 7, 2016 at 10:30 am. (Notice of docket entry sent to Attys. Vhay, Moore, Cray, and Egan)	02/29/2016	SCHEIER
20	Event Resulted The following event: Motion scheduled for 06/07/2016 10:30 AM has been resulted as follows: Result: Continued to June 7, 2016 at 10:30 am.	03/01/2016	FOSTER
21	Scheduled Event: Judgment on the Pleadings Date: 06/07/2016 Time: 10:30 AM	03/01/2016	
22	Two-Volume binded Adminstrative Record, filed.	03/16/2016	
23	135 Wells Avenue, LLC's Motion for Judgment on the Pleadings, filed.	04/01/2016	
24	135 Wells Avenue, LLC's Memorandum in Support of its Motion for Judgment on the Pleadings, filed.	04/01/2016	
25	Defendant Housing Appeal's Committee's Cross-Motion for Judgment on the Pleadings, filed.	05/02/2016	
26	Defendant Housing Appeal's Committee's Brief in Opposition to 135 Wells Avenue LLC's Motion for Judgment on the Pleadings and in Support of Cross-Motion for Judgment on the Pleadings, filed.	05/02/2016	
27	Defendant Housing Appeal's Committee's Appendix of Legal Authorities (Cross Motions for Judgment on the Pleadings), filed.	05/02/2016	
28	Opposition to Wells Avenue, LLC's Motion for Judgment on the Pleadings and the City of Newton and Newton Zoning Board of Appeals Cross Motion for Judgment on the Pleadings, filed.	05/02/2016	

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
CASE DOCKET

29	Newton Zoning Board of Appeals' Opposition to 135 Wells Avenue, LLC's Motion for Judgment on the Pleadings and Cross-Motion for Judgment on the Pleadings, filed.	05/02/2016	
30	135 Wells Avenue, LLC's Reply in Support of its Motion for Judgment on the Pleadings and Opposition to Cross-Motions for Judgment on the Pleadings, filed.	05/16/2016	
31	135 Wells Avenue, LLC's Appendix of Legal Authorities, filed.	05/16/2016	
32	Event Resulted The following event: Motion scheduled for 06/07/2016 10:30 AM has been resulted as follows: Result: Event Held	06/07/2016	FOSTER
33	Event Resulted The following event: Judgment on the Pleadings scheduled for 06/07/2016 10:30 AM has been resulted as follows: Result: Hearing on Cross-Motions for Judgment on the Pleadings held. Attorneys Michael D. Vhay Valerie A. Moore, Suzanne P. Egan, and Pierce O. Cray appeared. Cross-Motions taken under advisement.	06/07/2016	FOSTER
34	Plaintiff's Notice of Filing and Transription of the June 7, 2016 Motion Session, filed.	06/30/2016	
35	Memorandum and Order Denying Plaintiff's Motion for Judgment on the Pleadings and Granting Defendants' Cross-Motions for Judgment on the Pleadings, issued. (Copies Sent to Attorneys Michael D. Vhay, Suzanne P. Egan and Pierce O. Cray)	08/16/2016	FOSTER
36	Judgment entered. (Copies Sent to Attorneys Michael D. Vhay, Suzanne P. Egan and Pierce O. Cray)	08/16/2016	FOSTER
37	Notice of Appeal by 135 Wells Avenue, LLC to the Appeals Court filed.	09/14/2016	
38	A Copy of a Notice of Appeal Filed on September 14, 2016 by Attorneys Michael D. Vhay and Valerie A. Moore for Plaintiff 135 Wells Avenue, LLC Sent to Attorneys Suzanne P. Egan and Pierce O. Cray.	09/15/2016	
39	Notice of Assembly of Record on Appeal sent to the Clerk of the Appeals Court.	11/10/2016	
40	Notice of Assembly of Record on Appeal sent to all counsel of record.	11/10/2016	
41	Case entered in the Appeals Court as Case No. 2016-P-1570.	11/25/2016	

P. 6 of 6

I HEREBY ATTEST AND CERTIFY ON December 6, 2016 THAT THE FOREGOING DOCUMENT IS A FULL ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY.

Deborah J. Patterson

DEBORAH J. PATTERSON
RECORDER
LAND COURT